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## DEFINING RACIAL PROFILING IN A POST-SEPTEMBER 11 WORLD

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### INTRODUCTION

In the immediate aftermath of the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, there was an apparent shift in the debate about racial profiling. After years of condemning the practice of racial profiling as one that violated civil rights, commentators began to accept and even advocate the practice as a necessary tactic to fight terrorism.<sup>1</sup> Public opinion polls reflected a sudden approval of racial profiling as a sacrifice of civil liberties in order to achieve greater security. Arab-Americans, and those with Arab appearances, increasingly were singled out for questioning and security checks based on their skin color, clothing, name, or religious beliefs.<sup>2</sup>

Despite this change in support for racial profiling, the practice is no more appropriate after September 11 than it was during the War on Drugs. Using race to

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1. *Morning Edition: Use of Profiling to Discover Would Be Terrorists* (NPR radio broadcast, Feb. 12, 2002), available at LEXIS (transcripts). Professor Jonathan Turley of George Washington University stated,

There are 40 million people that travel by air in this country. We cannot stop each one of them and make an individualized determination of risk. We have to develop some type of profile. The fact is profiling is a legitimate statistical device. And it's a device that we may have to use if we're going to have a meaningful security process at these airports.

*Id.* at 2.

2. See, e.g., Stephanie Stoughton, *Fliers See Bias as Pilots Move to Bump Them: Fighting Terror Security v. Discrimination*, BOSTON GLOBE, Nov. 11, 2001, at A1 (describing incidents of flight crews removing airline passengers of Arab decent)

signal criminality, either as the sole factor or based on a general or circumstantial perception that there is a correlation between the race of an individual and her propensity to commit a particular crime, violates civil liberties and hinders potential short- and long-term law enforcement effectiveness.

The purpose of this Article is to argue that racial or religious profiling is neither necessary nor effective in the War on Terrorism, and to demonstrate that such profiling has serious potentially damaging consequences to long-term investigatory activities. Furthermore, racial or religious profiling is ineffective because it keeps law enforcement from digging deeper into criminal investigation. When law enforcement relies on a broad, superficial category such as race<sup>3</sup> or religion, this shortcut interferes with more effective techniques such as behavioral cues and suspect- or crime-specific descriptions or evidence.

In addition, when law enforcement practices are perceived to be biased, unfair, and disrespectful, communities of color and other minority groups are less willing to trust and confide in law enforcement officers and agencies, to report crimes that come to their attention, to provide intelligence and information, and to serve as witnesses at trials. This trend was evident during the War on Drugs when African-American, Hispanic and Asian communities, feeling unfairly targeted by law enforcement, hesitated to work in a partnership with the police. If the use of racial and religious profiling continues as a tactic in the War on Terrorism, Arab and Muslim communities may become more wary of assisting law enforcement agencies and less inclined to provide the intelligence information necessary to help to uncover those who threaten the safety of the United States.

This Article presents a definition of racial profiling and then applies this definition to both pre-September 11 and post-September 11 contexts to show how racial profiling is ineffective and potentially damaging to law enforcement. Part I of this Article outlines the history of racial profiling, specifically examining past evidence of racial profiling and connecting the use of racial profiling in the War on

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3. We use the term "race" to include concepts of race, ethnicity, and national origin. The 2000 U.S. Census did not consider Hispanics and Arabs to be separate racial groups. Indeed, "the federal government considers race and Hispanic origin to be two separate and distinct concepts." U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN, CENSUS 2000 BRIEF 2 (Mar. 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>. Moreover, the 2000 U.S. Census continued in the tradition of categorizing Arabs as "White": "'White' refers to people having their origins in any original peoples of Europe, the Middle East or North Africa. It includes people who indicated their race or races as 'White' or who wrote entries such as Irish, German, Italian, Lebanese, Near Easterner, Arab, or Polish." *Id.* For a further discussion of whether Arabs constitute a separate and distinct racial group, see *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that Arabs are a race for purposes of § 1981).

While the U.S. government does not consider Latinos and Arabs to be a distinct racial category, many Latinos and Arabs themselves often describe themselves as having multiracial or distinct ethnic identities. Therefore, we would describe Latinos and Arabs as ethnic groups who can be profiled based on these identities. For further discussion, see Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 963 (1995).

Terrorism with the pre-September 11 context of racial profiling applied to traffic stops. Part II examines the confusion between past definitions of racial profiling and proposes a revised definition. Part III clarifies some aspects of this definition of racial profiling by laying out a framework for discussing the use of race in law enforcement. Part III then examines the circumstances under which law enforcement might use race and whether such circumstances justify its use. Using real-life examples in which this definition was not followed, Part IV considers the inefficacy of racial profiling and the impact that racial profiling can have on law enforcement-community relations. Finally, Part V applies the definition to the post-September 11 context by working within the previously established framework.

### I. EVIDENCE OF RACIAL PROFILING BEFORE AND AFTER SEPTEMBER 11

American society has come to accept that to engage in effective law enforcement activities, local, state, and federal law enforcement agents must be vested with substantial discretionary decision-making powers. Law enforcement officials are responsible for deciding whom to stop or sanction and whom to ignore, thereby defining the parameters of who enters the criminal justice system.<sup>4</sup> However, with such substantial discretionary powers, questions have and will be raised as to whether law enforcement officials exercise their discretion fairly and without discrimination. The disproportionate and unwarranted targeting of people of color for traffic, airport, or pedestrian stops, searches, and arrests has come to be known recently as racial profiling. Although the perception of racial profiling may not always reflect reality, the appearance alone is sufficient to create resentment and distrust of the police in many communities.

The perception that police engage in racial profiling by singling out individuals based on their race, ethnicity, national origin, or religion arises out of a long American history of adversarial relations between law enforcement, communities of color, and other disenfranchised groups. The current popular understanding of the term "racial profiling" developed out of the "profile" of drug couriers created by the Drug Enforcement Agency ("DEA") during the mid-1980s as part of Operation Pipeline, the agency's effort to interdict interstate drug trafficking. The DEA trained local law enforcement agencies to be aware of behavioral clues of drug trafficking such as indications of point to point driving, nervousness, rented cars, and indications of concealment of drugs in the vehicle. Descriptions of Operation Pipeline training programs also suggest that the profile included

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4. Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility and Decisions in the Administration of Justice*, 69 YALE L.J. 543, 546-54 (1960) (arguing for increased review of police decisions not to enforce a law).

indications of race, age, and gender characteristics of potential traffickers.<sup>5</sup> The DEA's drug courier profile was promoted as a technique for identifying individuals or vehicles on which officers should do more investigation.

Early indications that race was inappropriately being used in investigatory traffic stops emerged through the courts.<sup>6</sup> In a civil case involving the Maryland State Police and a criminal case involving the New Jersey Highway Patrol, aggregate traffic stop data was introduced to help prove the existence of disparate stop practices. *Wilkins v. Maryland State Police*<sup>7</sup> was one of the first cases to introduce empirical evidence of racial disparities in traffic stops in order to prove the existence of racial profiling. In *Wilkins*, Dr. John Lamberth, an independent analyst hired by the American Civil Liberties Union (ACLU), compared the population searched and arrested on the Maryland turnpike with the demographics of individuals who violated traffic laws on Maryland highways. A violator survey consisting of observations of individuals violating posted speed limits on the Maryland turnpike indicated that 74.7% of speeders were white while 17.5% were black.<sup>8</sup> In contrast, according to Maryland State Police data, blacks constituted 79.2% of the drivers searched.<sup>9</sup>

Empirical data on stop and search practices in New Jersey also originated through actions of the court. In 1994, the Gloucester County Public Defender's office, representing Pedro Soto and others, filed a motion to suppress evidence obtained in a series of searches, alleging that such searches were unlawful because they were part of a pattern of racial profiling by the New Jersey Troopers.<sup>10</sup> In the discovery phase of the trial the defendants received traffic stop and arrest data compiled by the New Jersey State Police in selected locations from 1988 through 1991.<sup>11</sup> A statistical expert for the defendants testified that blacks comprised 13.5%

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5. Though the profile itself has never been officially publicized and has been modified repeatedly as drug dealers adapt to police pressure, elements of it have been pieced together from courtroom testimony. See Gary Webb, *DWB*, *ESQUIRE*, Apr. 1999, at 118 (describing Operation Pipeline); DAVID HARRIS, AM. CIV. LIBERTIES UNION, *DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS* (1999), available at <http://archive.aclu.org/profiling/report/> (recounting incidents of racial profiling during enforcement of traffic laws); cf. U.S. GEN. ACCOUNTING OFFICE, *RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS*, GAO-GGD-00-41, at 4 (2000), available at <http://www.gao.gov/new.items/gg00041.pdf> ("DEA's position is that it did not and does not teach or advocate using race as a factor in traffic stops.").

6. For an expanded discussion of the emergence of racial profiling claims, see Michael Buerger & Amy Farrell, *Evidence of Racial Profiling: Interpreting Documented and Unofficial Sources*, 5 *POLICE Q.* 272 (2002).

7. *Wilkins v. Md. State Police*, Civil Action No. CCB-93-483 (D. Md. filed 1993).

8. Report of Dr. John Lamberth, Plaintiff's Expert, *Wilkins v. Md. State Police*, Civil Action No. CCB-93-483 (D. Md. filed 1993) (on file with authors). For a discussion of the Lamberth study, see David Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 *MINN. L. REV.* 265, 280-81 (1999).

9. Lamberth, *supra* note 8.

10. *New Jersey v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (holding discriminatory intent may be inferred from statistical proof of police targeting minorities for prosecution of traffic offenses).

11. The stop and arrest information was compiled using patrol charts, radio logs, and traffic tickets for selected dates from April 1988 to May 1991. See *id.* at 352.

of the New Jersey Turnpike population and fifteen percent of the drivers who were observed speeding.<sup>12</sup> In contrast, blacks represented thirty-five percent of those stopped and 73.2% of those arrested.<sup>13</sup> The New Jersey Superior Court relied heavily on these statistics in its decision to suppress the evidence seized by the New Jersey State Troopers in nineteen consolidated criminal prosecutions. A subsequent United States Department of Justice (DOJ) investigation into the traffic stop practices of the New Jersey Highway Patrol following the *Soto* decision and a separate high-profile shooting on the New Jersey Turnpike<sup>14</sup> resulted in a consent decree between the New Jersey State Police and DOJ that mandated external review of all traffic stop and search activities.<sup>15</sup>

Subsequent voluntary and mandatory data collection efforts have uncovered similar patterns of racial disparities in traffic stops using either a residential or driving population data as a comparative benchmark.<sup>16</sup> Throughout these studies black and Hispanic drivers are consistently stopped at rates higher than their representation either on the roadways or in the population. While these findings indicate a pattern consistent with racial profiling, it is important to note that there are many potential legitimate factors that may explain part or all of this observed disparity. Some of these factors include racial differences in calls for service, warrant checks, or descriptions of suspects. The emergence of statistical evidence suggesting racial disparities in traffic stops has led many agencies voluntarily to collect data on the demographics of traffic stops. In addition, the legislatures in sixteen states have mandated some form of data collection to assess the existence of racial profiling.<sup>17</sup>

In addition to the empirical evidence supporting claims that people of color are stopped by police at rates higher than their representation in the population or on the roadways, national surveys conducted prior to September 11 indicated that a majority of Americans, regardless of race, believed that racial profiling was a significant social problem. According to a national Gallup Poll released on

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12. *Id.* at 352.

13. JOHN LAMBERTH, STATISTICAL ANALYSIS OF THE INCIDENCE OF POLICE STOPS AND ARRESTS OF BLACK DRIVERS/TRAVELERS ON THE NEW JERSEY TURNPIKE BETWEEN EXITS OR INTERCHANGES 1 AND 3 FROM THE YEARS 1988 THROUGH 1991 (revised Nov. 11, 1994) (on file with authors).

14. See John Kifner & David M. Herszenhorn, *Racial 'Profiling' at Crux of Inquiry Into Shooting by Troopers*, N.Y. TIMES, May 8, 1998, at A25.

15. *United States v. New Jersey*, Joint application for entry of Consent Decree, Civil No. 99-5970 (D.N.J. Dec. 31, 1999), available at <http://www.usdoj.gov/crt/split/documents/jerseysa.htm>.

16. For more information about disparities in traffic stops using both census and road survey data, see WILLIAM LANSDOWNE, SAN JOSE POLICE DEP'T SAN JOSE VEHICLE STOP DEMOGRAPHIC STUDY (2000); STEPHEN COX ET AL., DIV. OF CRIMINAL JUSTICE, INTERIM REPORT OF TRAFFIC STOPS STATISTICS FOR THE STATE OF CONNECTICUT (2001); GARY CORDNER ET AL., SAN DIEGO POLICE DEP'T, VEHICLE STOP STUDY: FINAL REPORT (2001); TEX. DEP'T OF PUB. SAFETY, TRAFFIC STOP DATA REPORT (2000); Matthew Zingraff et al., *North Carolina Highway Traffic and Patrol Study: 'Driving While Black,'* CRIMINOLOGIST No. 25-3, at 1, 3-4 (May 2000).

17. See Racial Profiling Data Collection Resource Center at Northeastern University, at <http://www.racialprofilinganalysis.neu.edu> (providing an overview and state-by-state description of legislative initiatives).

December 9, 1999, fifty-nine percent of the adults polled believed that the police actively engaged in racial profiling and, more significantly, eighty-one percent said that they disapproved of the practice.<sup>18</sup> When the responses to the survey question were broken down by race, fifty-six percent of whites and seventy-seven percent of blacks responded that racial profiling was pervasive.<sup>19</sup> Additionally, the Gallup Poll asked respondents how often, in their perception, the police had stopped them based on their race alone.<sup>20</sup> Six percent of whites and forty-two percent of blacks of all ages responded that they had been stopped by the police because of their race.<sup>21</sup> Seventy-two percent of black men between the ages of eighteen and thirty-four believed they had been stopped because of their race.<sup>22</sup>

The survey data also highlighted the connection between perceptions of racial profiling and animosity toward law enforcement. In addition to gathering data on individual perceptions of stops by the police, the 1999 Gallup Poll asked respondents how favorably they viewed the police.<sup>23</sup> Eighty-five percent of white respondents had a favorable response toward local police and eighty-seven percent had a favorable response to state police.<sup>24</sup> However, black respondents overall had a less favorable opinion of both local and state police, with just fifty-eight percent having a favorable opinion of the local police and sixty-four percent having a favorable opinion of the state police.<sup>25</sup> The less favorable responses of black respondents toward local and state police may be explained by perceptions of disparate treatment by the police. More than half (fifty-three percent) of the black men between the ages of eighteen and thirty-four who were surveyed believed that they have been treated unfairly by local police.<sup>26</sup> A 2001 Kaiser Family Foundation Data survey (conducted before the events of September 11) supported these findings, as fifty-two percent of black men and twenty-five percent of black women reported that they had been unfairly stopped because of race.<sup>27</sup>

Although recent concerns about racial profiling emerged from the public perception that law enforcement agents were inappropriately using race as part of a profile in interstate drug courier investigations, the term evokes the historic

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18. DECEMBER 9 RACIAL PROFILING, in GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1999*, at 238-40 (Scholarly Resources Inc. 1999).

19. *Id.*

20. *Id.* at 238.

21. *Id.*

22. *Id.*

23. *Id.* at 239.

24. GALLUP, *supra* note 18.

25. *Id.*

26. *Id.*

27. Richard Morin & Michael H. Cottman, *Discrimination's Lingering Sting*, WASH. POST, June 22, 2001, at A1 (reporting some results of WASH. POST & KAISER FAMILY FOUND., *RACE AND ETHNICITY IN 2001: ATTITUDES, PERCEPTIONS, AND EXPERIENCES* (Aug. 2001)).



conflict between police and communities of color in the United States.<sup>28</sup> As a result, the racial profiling controversy of the late 1990s mainly focused on police inappropriately targeting Black and Hispanic individuals for investigatory activities. Following the September 11 terrorist attacks on the World Trade Center and the Pentagon and during the United States' newly declared "War on Terrorism," however, new questions and concerns have been raised about racial profiling of Arab and Muslim Americans. Arabs, Muslims, and others whom police and security personnel perceive to be Arab or Muslim complain that they have been disproportionately singled out for searches at airports and for traffic stops in the wake of September 11. For example, more than 1700 incidents of harassment, discrimination, and violence against Arabs, Muslims, and those thought to resemble those groups have been reported to organizations including the FBI, ACLU, the Council on American-Arab Relations, and the American Arab Anti-Discrimination Committee.<sup>29</sup>

The public support for racial profiling as a method for preventing acts of espionage or terrorism is reminiscent of sentiment expressed in this country prior to the internment of Japanese-Americans residing on the West Coast during World War II. When the U.S. government singled out those of Japanese ancestry, claiming that anyone of Japanese ancestry might be capable of espionage and sabotage, the government discriminated solely on account of national origin. In taking these actions, the government used Japanese ancestry as a proxy for espionage and sabotage, and the Supreme Court declared the action justifiable under pressing public necessity.<sup>30</sup> Perhaps most disturbing is that the government knew that the internment was *not* necessary for national security but nevertheless proceeded with the internment of tens of thousands of Americans.<sup>31</sup>

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28. Consider, for example: state-sanctioned slavery; law enforcement participation in the capture of runaway slaves; beatings and lynchings of people of color by state agents; police enforcement of Jim Crow segregation; the "Zoot Suit" riots between police and navy personnel against Hispanics in Los Angeles in 1943; police participation in the suppression of the efforts to register black voters in the South; the Watts, Detroit, Newark, and other riots of the 1960s; and more recent events, such as the videotaped beating of Rodney King by officers of the Los Angeles Police Department or the Mollen Commission's 1994 report of widespread police brutality against minority citizens in the Bronx.

29. COUNCIL ON AM.-ISLAMIC RELATIONS RESEARCH CTR., *THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2002: STEREOTYPES AND CIVIL LIBERTIES 9* (2002), available at <http://www.cair-net.org/civilrights2002/civilrights2002.pdf> (showing backlash incidents against Muslims following the September 11 terrorist attacks); see also Am.-Arab Anti-Discrimination Comm., *ADC Fact Sheet: The Condition of Arab Americans Post-9/11*, Nov. 27, 2002, available at <http://www.adc.org/index.php?id=282> (same).

30. *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (holding that exclusion of individuals of Japanese ancestry from their homes was a permissible exercise of military judgment due to the "definite and close relationship to the prevention of espionage and sabotage").

31. See COMM. ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, REPORT: PERSONAL JUSTICE DENIED, PART TWO: RECOMMENDATIONS, at 5 (1983). The report revealed that although two thirds of the 120,000 Japanese living in the U.S. were American-born, General John L. DeWitt (Commander of the U.S. Western Defense) doubted their loyalty to the United States because of their Japanese ancestry. *Id.* at 18, 88-92. He believed that the

As the country faces new questions about both the existence and legitimacy of racial and religious profiling as an investigatory strategy, it is increasingly important to develop a definition that can be accepted by courts, legislators, scholars, and community members in the process of assessing the problem of racial profiling.

## II. DEFINING RACIAL PROFILING

Any analysis concerning the nature, scope, or accuracy of allegations of racial profiling will depend in large part on how "racial profiling" is defined. The term "profiling" refers to the "police practice of viewing certain characteristics as indicators of criminal behavior."<sup>32</sup> Profiling is now an established law enforcement practice that incorporates social science theory and statistical methodology into crime solving strategies. In some instances, profiling successfully supplements more established law enforcement practices.<sup>33</sup>

Though law enforcement agents historically have used race as an implicit signal for criminal behavior through conscious or unconscious racism, "racial profiling" is a relatively new term. The lack of a consensus as to the meaning of "racial profiling" adds complexity to law enforcement and community attempts to address it.<sup>34</sup> One of the lessons learned during the War on Drugs was that when discussions

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Japanese could never assimilate and become Americans. *Id.* at 88-92. DeWitt argued that Japanese "sleeper cells" were operating in the U.S. and that the only way to curb Japanese-American sabotage was the internment of all persons of Japanese descent residing on the West Coast. *Id.* The report confirmed that not a single act of Japanese-American sabotage was ever documented and that, in fact, Japanese-Americans were fiercely loyal American citizens. *Id.* at 18, 88-92; see also *Korematsu*, 323 U.S. at 223 (Murphy, J., dissenting) (stating that there was no evidence of Japanese disloyalty sufficient to justify internment of Japanese-Americans). Almost fifty years later, Congress passed the Civil Liberties Act of 1988, which acknowledged the internments as "a grave injustice" and mandated Congress to pay each victim \$20,000 in reparations. War and National Defense Restitution for World War II Internment of Japanese-Americans and Aleuts, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified as amended at 50 U.S.C.A. app. § 1989b-4 (1990)).

32. Harriet Barovick, *DWB: Driving While Black*, TIME, June 15, 1998, at 35 (defining the term "profiling," and citing police authorities' uniform denial that race is permissibly used as one such characteristic for police to consider).

33. See JOHN E. DOUGLAS & MARK OLSHAKER, MINDHUNTERS: INSIDE THE FBI'S ELITE SERIAL CRIME UNIT (1995) (detailing the ways in which Douglas has spent his career in the FBI preparing profiles on serial criminals to assist in locating the perpetrators of similar crimes).

34. For a discussion of the debate over how to define racial profiling, see Jim Cleary, *Racial Profiling Studies in Law Enforcement: Issues and Methodology*, MINN. HOUSE OF REP. RESEARCH INFO. BUREAU 5-6 (June 2000), available at <http://www.house.leg.state.mn.us/hrd/pubs/raceprof.pdf> (discussing the differences between definitions of racial profiling; under the narrow definition, racial profiling occurs only when a person is stopped solely on the basis of their race or ethnicity, under the broader definition, racial profiling occurs when an officer routinely uses race as one of several factors the officer considers when deciding to stop someone); see also David Cole & John Marcello, *Symposium, Q: Is Public Concern about Federal Police Using Racial Profiling Justified?*, INSIGHT, July 19, 1999, at 24-27 (presenting two opposing viewpoints on whether the public should be concerned about federal police using racial profiling); Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAGAZINE, June 20, 1999, at 51, 56 (stating that former New Jersey Governor Christine Todd Whitman's statement that "Racial

about racial profiling failed to begin with a clear definition of the term, a false consensus inevitably would develop. While it appeared that law enforcement and civil rights groups agreed in their condemnation of the practice, in fact, the consensus was based upon differing definitions of what constituted racial profiling.

For instance, a broad spectrum of unlikely allies appeared to agree that the practice of racial profiling should be ended. In June 1999, during then-Attorney General Janet Reno's "Strengthening Police-Community Relationships" conference, President Clinton called racial profiling a "morally indefensible, deeply corrosive practice" and further stated that "racial profiling is in fact the opposite of good police work, where actions are based on hard facts, not stereotypes. It is wrong, it is destructive, and it must stop."<sup>35</sup> Similarly, in February 2001 President George W. Bush appeared to join the anti-profiling movement during an address to a joint session of Congress by declaring: "[Racial profiling is] wrong and we will end it in America."<sup>36</sup> It remains to be seen, however, whether the Clinton Administration's understanding of what it means to eliminate racial profiling will be the same as the current Bush Administration's, because both have failed to articulate a clear definition.<sup>37</sup>

### A. *Competing Definitions*

It is evident that the definition one chooses will determine one's perception of the scope of the problem and the need for a response to it. Therefore, to better understand and address the issue of racial profiling, courts, law enforcement agencies, community groups, and scholars must clearly define "racial profiling" and determine what role race should play in law enforcement actions. Over the last decade, two very different definitions of "racial profiling" have emerged, one narrow and one broad, both attempting to define the law enforcement practice of using race as part of the calculus in determining whom to question, stop, or search.

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profiling . . . is when race is the only factor" is a narrow and myopic definition which "suggests that only stone racists practice racial profiling").

35. President Bill Clinton, Remarks at the Justice Department Conference on Strengthening Police-Community Relations (June 9, 1999) (transcript available from the Federal News Service).

36. President George W. Bush, Address of the President to the Joint Session of Congress (Feb. 27, 2001), available at <http://www.whitehouse.gov/news/releases/2001/02/20010228.html> (transcript).

37. Although neither administration has clearly defined racial profiling, President Bush's "Directive on Racial Profiling" talks about law enforcement's use of "race as a factor," suggesting that Bush's administration has adopted a definition of racial profiling that is broader than simply banning the use of race as the sole criterion in a stop or search. President George W. Bush, *Memorandum for the Attorney General* [regarding racial profiling], Feb. 27, 2001, available at <http://www.whitehouse.gov/news/releases/2001/02/20010228-1.html>. However, Attorney General John Ashcroft, in his news conference of March 1, 2001, referred to the practice of treating people "solely" based on their race, suggesting that his definition of racial profiling may only apply to situations in which race is the only factor and not one among many. Attorney General John Ashcroft, Remarks at Attorney General News Conference (Mar. 1, 2001), available at <http://www.usdoj.gov/ag/speeches/2001/030101racialprofconf.htm> (transcript of the press conference).

Under the narrow definition, racial profiling occurs when a law enforcement action is based on the race of the suspect, so that race is the sole criterion for questioning, stopping, or searching a suspect.<sup>38</sup> Relying on this narrow definition, virtually all law enforcement agencies can honestly say that, as a matter of policy, they do not engage in racial profiling and direct their officers not to engage in it. During the era of Jim Crow, there were police departments in this country that engaged in this form of racial profiling. While there may be some that still do, such a department would be the rare exception rather than the rule. Similarly, there certainly continue to be individual police officers who will stop a young black male solely because that person is young and black and either driving or walking in a white community, but few of them would concede that the stop was based solely on the race of the suspect. In short, this narrow definition defines away the problem of racial profiling by limiting it to the relatively rare instance when race, by itself, is the sole basis for the stop or search. As Professor Randall Kennedy has often observed, even the most racist police officers do not act solely on the basis of race; other factors ordinarily also come into play.<sup>39</sup> However, by allowing race to be one factor among many, courts have, in effect, adopted this narrow definition.<sup>40</sup>

According to the broader definition, racial profiling occurs when a law enforcement officer relies upon race, ethnicity, national origin, or religion as one of several factors in determining whom to stop, search, or question.<sup>41</sup> Under this definition, racial profiling occurs whenever race is part of the calculus of suspicion, which may include other factors such as gender, age, general appearance, and behavior. "Properly understood, . . . racial profiling occurs whenever police routinely use race as a negative signal that, along with an accumulation of other signals, causes

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38. For instance, the General Accounting Office defines racial profiling simply as "using race as a key factor in deciding whether to make a traffic stop." U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 1.

39. See Randall Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13 & 20, 1999, at 30, 35 ("Not even Mark Fuhrman was known to detain elderly women who happened to be black.").

40. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975):

In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants. . . . [but] this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country.

*United States v. Martinez-Fuerte*, 428 U.S. 543, 562-63 (1976) (distinguishing the "roving-patrol" stop in *Brignoni-Ponce*, the Court concluded that referrals of motorists to a secondary inspection area do not violate the Constitution, even when the referrals are "made largely on the basis of apparent Mexican ancestry"); see also *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc) ("Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required. Moreover, we conclude . . . that it is also not an appropriate factor.").

41. For instance, the "End Racial Profiling Act of 2001," sponsored by Rep. John Conyers, Jr., and Sen. Russell D. Feingold, defines racial profiling as "relying, to any degree, on race, ethnicity, or national origin in selecting which individuals to subject to routine investigatory activities." H.R. 2074, 107th Cong. § 501(5) (2001); S. 989, 107th Cong. § 501(5) (2001).

an officer to react with suspicion.”<sup>42</sup> Under this definition, the use of race as one of many factors need not be conscious; it may be the unconscious product of racial stereotyping. Consequently, with this definition, racial profiling includes actions by law enforcement officers who are acting in good faith, and who believe sincerely that they are not using race as a factor but who in reality are unconsciously making inferences as to criminal behavior that rely on little more than generalized racial stereotypes.

### *B. Proposed Definition*

We propose a definition whose terms bridge the divide between the narrow and the broad definition. Generally, racial profiling is the inappropriate<sup>43</sup> use of race, ethnicity, or national origin, rather than behavior or individualized suspicion, to focus on an individual for additional investigation. The use of race is not inappropriate if law enforcement has specific, concrete evidence linking race to a particular person or particular criminal incident. In evaluating whether or not to use race as part of a profile, law enforcement should utilize these guidelines: (a) how effective is such a strategy?; (b) what effect will this strategy have on community relations?; (c) will this strategy be perceived as violating basic civil rights?; (d) how many innocent people will be stopped as a result of this investigative strategy?; and (e) could an alternative race-neutral strategy be crafted to accomplish the law enforcement goal?

The first part of the definition prohibits law enforcement from using race, ethnicity, or stereotypes as factors in selecting whom to stop, search, or question. Instead, it focuses the police on the behavior of the individual and requires more specificity to stop and search. When law enforcement uses race as a signal for criminality in initiating law enforcement actions, it results in ineffective law enforcement, strained community relations, and violations of basic civil rights. By using multi-layered profiles based on intelligence information and behavioral factors, however, rather than simply casting the net broadly to include just members of one race, one ethnicity, or one religion, police can be more probative and can more effectively focus their criminal investigations on appropriate criminal suspects. Both in the pre-September 11 and post-September 11 contexts, the use of race alone, or even as a component in creating a criminal profile

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42. Kennedy, *supra* note 39, at 35.

43. It is particularly important to distinguish between the “inappropriate” use of race and the “illegal” use of race. Circumstances under which we argue the use of race is inappropriate and therefore constitutes racial profiling may very well be “legal” according to the courts. See *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000) (“Yet our role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause.”), *amending and superseding* 195 F.3d 111 (2d Cir. 1999), *reh’g en banc denied*, 235 F.3d 769 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001).

designed to prevent future crime, reduces the effectiveness of law enforcement.

The next section of the definition recognizes several very limited exceptions to this general rule, specifically providing instances where the use of race can be a permissible part of a profile. The first exception is that police may use race after a crime has been committed to determine whether a person matches the specific description of a particular identified suspect within a particular vicinity and within a specific time period. In this *suspect-specific description*, race can be one of multiple variables if those variables include particular, credible, readily identifiable and distinctive facts, characteristics, or behavior.

A second exception has been created for *future crimes* involving a particular group of potential suspects at a specific location, for a short, specified duration of time. This situation arises when police have gathered information that a crime *will* take place at a particular location, and involves suspects of a particular race. In this instance, where police have specific, concrete evidence linking race to a specified *future* criminal incident, race may be used as part of a multi-variable profile.

Pragmatically, then, racial profiling exists under this definition when:

1. Race or nationality, along with gender and age, is used as the *sole* basis in determining whom to stop when investigating a specific crime committed by a person of that race or nationality or when investigating a criminal organization comprised wholly or largely of members of that racial or national group;
2. Race or nationality is used as a factor in determining whom to stop based on the belief that race, ethnicity, or national origin are positively correlated with criminality.

Conversely, racial profiling does not exist when:

1. For a limited time and within a particular vicinity, police are investigating a specific crime committed by a specific person and race or nationality is part of a multi-variable description containing particular readily identifiable and distinctive factors, characteristics or behavior beyond race, ethnicity, or national origin;
2. For a limited period of time and at a specific location, using concrete evidence linking race to a specific, particular criminal incident, police use race, ethnicity, or national origin as part of a multi-variable description.

In summary, racial profiling exists when race or nationality is used as a factor in determining whom to stop, search, question, or arrest—whether in an investigative stop and frisk, a motor vehicle pretext search, or a security search—unless there is a suspect-specific or crime-specific exception to this general rule. When we discuss stopping, searching, questioning, and arresting in this context, we are referring to criminal predicate stops, motor vehicle stops, and border stops. These are “coercive” stops in the sense that a person stopped in these circumstances is not free to ignore the questions and walk away. The value of this definition and these

guidelines is that they turn the debate away from charges of racism and mere factor-counting towards a discussion about effectiveness, the need for positive law enforcement/community relations, and the willingness of the nation to infringe on the civil liberties of certain people in certain circumstances. While race-based law enforcement practices were of critical concern before September 11, 2001, when law enforcement efforts focused on preventing acts of violence, thefts, and narcotics distribution, such practices have grown more important since the tragedy.

The remainder of this Article further clarifies both the prohibitions and exceptions in this definition. The Article then examines the practice of racial profiling based on this definition and propose guidelines for evaluating the use of race in law enforcement activity in both pre-September 11 and post-September 11 contexts.

### III. CLARIFYING THE DEFINITION

#### *A. Framework*

Given the definition of racial profiling as the inappropriate use of race in law enforcement actions, we must confront the key questions in the racial profiling debate:

- Can race, ethnicity, national origin, or religion, standing alone, ever be a sufficient basis to justify a stop, search, arrest, or other law enforcement action?

What if a criminal organization is comprised solely or almost solely of persons of a particular nationality or religion? What if such a criminal organization is engaged in planning gruesome acts of mass terrorism?

- Can race, ethnicity, national origin, or religion ever be a legitimate factor to be considered, along with other factors, in deciding whether to stop, search, or arrest a possible suspect?

If so, how significant a factor may it be among the other factors?

- Can race, ethnicity, national origin, or religion ever be a legitimate factor to be considered, along with other factors, in a generalized profile of criminal behavior?

If so, how significant a factor may it be among the other factors?

These questions are analyzed in the context of five different types of law enforcement stops of individuals. Our discussion of the use of race, ethnicity, or national origin in making law enforcement decisions is made in the context of these five types of stops:

### 1. Truly Voluntary Encounters

If an encounter is truly consensual, then, under our definition, race, nationality, or religion may be used as a factor only in the context of determining with whom to ask to speak or to request a meeting.<sup>44</sup>

### 2. Judicially Deemed “Consensual” Stops

A law enforcement officer can stop an individual momentarily for any reason to question him or her. Without a criminal predicate, however, such as reasonable suspicion, the person is free to ignore the question and walk away. Since the questioning cannot be prolonged without the voluntary cooperation of the person stopped, these are not truly “stops” under the law, but such an encounter may feel like a stop to the person being questioned.<sup>45</sup>

### 3. Criminal Predicate Stops

For a law enforcement officer to temporarily hold a person against his or her will, whether to wait for an alleged victim to arrive for a “show up” or for a dispatcher to run the person’s name through a computer directory of persons with outstanding warrants, the police officer must at least have reasonable suspicion that the person has engaged or is engaging in criminal activity. To frisk that person for weapons during the stop, the police officer must have a reasonable basis to believe that the person possesses a weapon and poses a danger to the police officer. To conduct a search of that person or to arrest him or her, the police officer must have probable cause to believe that he or she has committed a crime.<sup>46</sup>

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44. We envision this type of stop as law enforcement working in partnership with community leaders and community organizations and with the cooperation of the community by requesting to talk with certain individuals in a neutral, non-police-stop setting. One example of this occurred recently in Dearborn, Michigan, when FBI officials, after consulting with community leaders, sent letters to five hundred members of the local Muslim community requesting individual meetings. As a result of engaging in this partnership approach, the FBI successfully met with all but twelve of the five hundred men to whom they sent letters. See *Civil Liberties and the War on Terrorism, Voices of Reflection* (NPR News radio broadcast, Aug. 28, 2002), available at [http://www.npr.org/news/specials/091102reflections/civil\\_liberties/index.html](http://www.npr.org/news/specials/091102reflections/civil_liberties/index.html) (summarizing the radio broadcast).

45. See *Florida v. Royer*, 460 U.S. 491, 497 (1983) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street . . . , by asking him if he is willing to answer some questions . . . .”) (citations omitted). Race cannot be used as one of many factors for any coercive stop, search or interference with a person’s movement or liberty. Coercive stops refer to any stops, except those in which the person has formally agreed, without pressure or coercion from law enforcement, to meet with the police. Indeed, we do not believe that judicially deemed “consensual stops” meet this limited exception.

46. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968):

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of



#### 4. Motor Vehicle Stops

A law enforcement officer may stop the driver of a car if the police officer has probable cause to believe that the driver has committed a motor vehicle violation. In most jurisdictions, the police officer may arrest the driver for a motor vehicle violation, conduct a search of the driver's person and vehicle incident to arrest, and take custody of the car during the period of the arrest, which permits a more thorough inventory search of the vehicle. While the motor vehicle violation may reflect a risk to safety, as with speeding or reckless driving or driving without a valid license, the violation may be a relatively minor violation, such as making a turn without signaling, driving without an emissions sticker, or even driving too slowly. The scope of potential motor vehicle violations is so broad that if a police officer follows virtually any car for a substantial period of time, he is likely to find some violation that legally may justify a stop.

However, sometimes the motor vehicle violation is used as a pretext to stop a car, question the driver or passengers, and to search the vehicle in the absence of adequate predication for a criminal predicate stop. There is nothing illegal, at least in the criminal law, about pretext stops. In *Whren v. United States*,<sup>47</sup> the Supreme Court declared that, in evaluating a motion to suppress the fruits of such a stop, the court must look only to whether there is adequate predication to justify the motor vehicle stop. The court should not consider the intent of the police officer. Consequently, if the predication is sufficient to justify a motor vehicle stop, it does not matter if the police officer used the motor vehicle violation purely as a pretext for a stop focused on criminal investigation.<sup>48</sup>

#### 5. Border Stops

When a person is boarding an airplane or crossing a border, the law permits the search of a person and his belongings without any predication at all. The sole purpose of airplace searches is the security of the airplane and its passengers. The purpose of border searches is not only to check for weapons, but also to search for contraband such as narcotics or heavily taxed goods, including cigarettes and alcohol.<sup>49</sup>

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the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

47. 517 U.S. 806 (1996).

48. *Id.* at 817-18 (permitting motor vehicle stops based on legitimate, albeit pretextual, motor vehicle violations).

49. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 537-38 (1985) (noting that "[s]ince the founding of our Republic," Congress has granted the executive branch "plenary authority" to conduct warrantless routine searches "to regulate the collection of duties and to prevent the introduction of contraband into this country") (citations omitted).

### *B. Analysis*

Law enforcement agencies generally focus on the race or ethnicity in determining whom to stop for three main reasons: (1) because agencies believe that particular races or ethnicities are more likely to engage in criminal behavior; (2) because agencies have received a physical description of a specific suspect that includes race or ethnicity; or (3) because agencies have intelligence about a specific crime that is to be committed by suspects of a particular race. This Section discusses these reasons in detail, examining each in terms of the five types of law enforcement stops identified earlier and focusing on whether the use of race or ethnicity is legitimate and whether such use results in effective law enforcement.

#### *1. Perceptions of Correlations Between Race and Criminal Activity*

While some limited and relatively rare circumstances exist in which specific and credible information about a criminal suspect allows law enforcement officers legitimately to focus on race, it is all too common for officers to focus on race or ethnicity without such specific and credible information. Incidents where persons are stopped based on race or ethnicity alone are frequently motivated by a belief among law enforcement and the population at large that there is a general correlation between criminality and people of color, manifesting in either a conscious or unconscious belief that people of color are more likely than whites to engage in criminal behavior.

The correlation between race and criminality can be perceived as either a general correlation or a specific or circumstantial correlation. Officers working from a general correlation believe that a person of color, regardless of the circumstances, is significantly more likely to be engaged in criminal activity than a person who is white. Therefore, even if the officer knows nothing more about a person than the color of his or her skin, that fact alone is sufficient to raise suspicions of criminal activity.

Officers acting on a circumstantial correlation may not necessarily believe (or be willing to act on the belief) that people of color are more likely *in general* to be engaged in criminal activity than white people, but might believe that the likelihood of criminal activity increases when people of color are in certain circumstances. Such circumstances might include when a person of color is: (1) in a white neighborhood; (2) in an expensive car; or (3) with a group of young men of color.

Law enforcement agents who make decisions based on either correlation will use race, ethnicity, or national origin in any or all of the five types of law enforcement stops, and they are thus engaging in racial profiling. Given their belief that criminal activity and race are correlated in some way, they may stop people of color more frequently for consensual stops, or they may target people of color and, after observing their behaviors, stop them for criminal predicate stops. Officers acting on these beliefs will also use motor vehicle pretext stops more frequently

when the driver and/or passengers are people of color, enabling them to question the driver and possibly search the driver and/or the car. Law enforcement officials who work at the border or in airports and who believe in a correlation between race and crime will likely target people of color more frequently for security stops. Clearly, then, the perception of a correlation between race and crime will result in many more people of color being stopped in all five types of stops.

No data demonstrates either a general or a circumstantial correlation between race and crime. While a wealth of data exists regarding the number of persons arrested and convicted in this nation and their race, there are inherent limitations in this data. The main limitation is that the data focus on arrests and convictions, rather than on the actual incidence of criminal conduct, and these numbers cannot account for law enforcement or prosecutorial discretion. Therefore, in many instances, especially in the context of narcotics distribution and other non-violent crime, it is impossible to identify the degree to which the higher rate of arrests and convictions among males of color reflects a greater focus on and willingness to arrest or prosecute them or if it reflects a greater incidence of actual criminality.<sup>50</sup>

In the context of drug interdiction and traffic stops, data disproves the presence of a circumstantial correlation between race and criminality. Moreover, the best way to discern whether race plays a factor in determining who is carrying contraband is to examine “hit rates”—the rates at which different racial or ethnic groups are found to be in possession of drugs when they are searched.

Dr. Lamberth conducted one of the first such studies in 1996.<sup>51</sup> He examined data from Maryland State police searches and discovered that although blacks were searched with greater frequency than whites, drugs were found on approximately twenty-eight percent of blacks stopped and on approximately twenty-eight percent of whites stopped. Thus, the data showed that minorities were no more likely to be carrying contraband than whites.

Many researchers and scholars found this result surprising.<sup>52</sup> Since that initial study, recent data from many police departments confirms that using race as part of a profile does not enhance the ability of the police to interdict drugs. Indeed, collectively, these studies indicate that racial profiling is “counterproductive to good police work because it

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50. A study conducted on drug charges in Dorchester District Court revealed that even when whites and people of color engage in the same behavior, whites were charged more leniently and sentences tended to be “continued without a finding,” resulting in no jail time and an expunged record of the offense after one year. Blacks and Latinos, however, were more often charged with possession with intent to distribute in a school zone, which carries a minimum mandatory jail sentence. Robert Keough, *The Color of Justice*, COMMONWEALTH, Summer 2000, at 32. It may well be, however, that for specific types of violent crimes, there are some racial disparities in actual criminality.

51. John Lamberth, *Driving While Black: A Statistician Proves That Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C1, C5. For a discussion of the Lamberth study, see Harris, *supra* note 8, at 280-81.

52. John Lamberth, *Racial Profiling: Assessment and Evaluation*, Invited address at the Racial Statistics and Public Policy Seminar, University of Pennsylvania (Mar. 2002) (unpublished paper on file with authors).

doesn't work."<sup>53</sup> The next chart depicts several studies and their results. We chose these studies because they provide a representative sample of the studies done to date.

**Hit/Arrest Rates for Persons Searched Across Racial Groups**  
**Percentage of Persons within Racial Groups Found with Contraband**

Selected Studies	White	Black	Latino	Asian	Total Survey <i>N</i>
1998 U.S. CUSTOMS <sup>54</sup>	6.7%	6.3%	2.8%		51,000
1995–1996 (arrest or seizure) MARYLAND <sup>55</sup>	28.8%	28.4%	N/A		1,148
1997–1998 (arrest or seizure) NEW JERSEY <sup>56</sup>	10.5%	13.5%	N/A		78
1998 NORTH CAROLINA <sup>57</sup>	33%	26.3%			826 (searches)
1998–1999 (arrest only) NEW YORK <sup>58</sup>	12.6%	10.5%	11.3%		175,000
2000 OAKLAND, CA <sup>59</sup>	23%	24%	29%	26%	2146 (searches)
2001 (seizure only) SACRAMENTO <sup>60</sup>	22.2%	23.3%	20.5%	19.1%	36,854
1998 (arrest only) LONDON <sup>61</sup>	11.1%	11.7%	N/A	9.4%	85,000

53. *Id.*

54. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE HON. RICHARD J. DURBIN, U.S. SENATE, U.S. CUSTOMS SERVICE: BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS, GAO/GGD-00-38, at 55 (Mar. 17, 2000).

55. Memorandum in Support of Plaintiffs' Motion for Enforcement of Settlement Agreement and for Further Relief, *Wilkins v. Md. State Police*, Civil Action No. CCB-93-483 (D. Md. filed 1993).

56. PETER VERNIERO & PAUL ZOUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 28 (Apr. 20, 1999) (report of N.J. Att'y Gen. Verniero and First Ass't Att'y Gen. Zoubek).

57. MATTHEW ZINDGRAFF ET AL., EVALUATING NORTH CAROLINA STATE HIGHWAY PATROL DATA: CITATIONS, WARNINGS, AND SEARCHES IN 1998, at 22 (Nov. 1, 2000), available at <http://nccrimecontrol.org/shp/neshpreport.htm> (report prepared by the N.C. Center for Crime and Justice Research at N.C. State Univ. and the Center for Criminal Justice Research & Int'l Initiatives at N.C. Central Univ.).

58. ELIOT SPITZER ET AL., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 95 (Dec. 1, 1999), available at [http://www.oag.state.ny.us/press/reports/stop\\_frisk/stop\\_frisk.html](http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html).

59. ERIC HUESMAN, OAKLAND POLICE DEP'T, VEHICLE STATISTICS STUDY (Apr. 30, 2001) (on file with author).

60. HOWARD P. GREENWALD, FINAL REPORT: POLICE STOPS IN SACRAMENTO, CALIFORNIA app. II, tbl.13 (Oct. 31, 2001).

61. Marian FitzGerald, *Searches in London, Interim Evaluation of Year One of the Programme of Action*, London, England: Home Office, Aug. 1999, at 21.

One of the most prominent features of this data is its consistency. In all of the published studies to date, minorities are no more likely to be in possession of contraband than whites. Moreover, in many of the studies, minorities, especially Latinos, are less likely to be carrying contraband. Three of the selected studies examine data from motorists on highways. In these studies, state police or highway patrols are the primary law enforcement entities. Oakland and Sacramento are urban areas with local police forces comprising the main law enforcement agencies. Both New York and London involve stops and searches of pedestrians. Finally, the Customs data involves searches of air passengers returning to the United States. Though these studies differ dramatically in location, type of law enforcement entities, methodologies, etc., they all point to the same conclusion: the rate at which minorities carry contraband is equal or less than that of whites. While other studies exist, the pattern of results is the same and there are no conflicting studies.<sup>62</sup>

Another particularly noteworthy experience is that of the U.S. Customs Service. In 1999, Customs revamped its stop and search procedures to remove race from the factors considered when stop decisions were made. Instead, Customs agents selected suspects for stops and searches using observational techniques and focusing on specific behaviors, such as signs of nervousness, inconsistencies in passenger accounts, intelligence information, etc. Once they removed race from the equation, the data reveal dramatically different results. In 2000, Customs conducted seventy percent fewer searches and their hit rates improved from approximately five percent to over fifteen percent.<sup>63</sup>

First, the dramatic decline in the number of searches conducted (70%) is noteworthy. By using intelligence-based behavioral and race-neutral criteria, Customs was able to improve its "hit rate" and stop fewer innocent people. All of the data present a clear picture: using race as a part of a profile does not assist law enforcement in discerning who is carrying contraband.

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62. Lamberth, *supra* note 52.

63. *Id.* This data is buttressed by studies showing that most people who use drugs in this country are white and most purchasers of drugs buy their narcotics from members of their own race. See K. JACK RILEY, NAT'L INST. OF JUSTICE & OFFICE OF NAT'L DRUG CONTROL POL'Y, CRACK, POWDER COCAINE, AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES 1 (Dec. 1997); see also U.S. Customs Service: *Observations on Selected Operations and Program Issues: Testimony Before the Subcomm. on Gov't Mgmt., Info. & Tech., Comm. on Gov't Reform, House of Rep.*, Apr. 20, 2000, available at GAO/T-GGD/AIMD-00-150 (statement of Laurie E. Ekstrand, Dir., Admin. of Justice Issues, Gen. Gov't Div., Gen. Accounting Office, and Randolph C. Hite, Assoc. Dir., Governmentwide and Defense Info. Sys. Issues, Accounting & Info. Mgmt. Div., Gen. Accounting Office); U.S. GEN. ACCOUNTING OFFICE, *supra* note 54; Press Release, U.S. Customs Serv., Customs Releases New Personal Search Statistics: Latest Data Suggest Internal Reforms Are Working (Apr. 10, 2000).

**"Hit" Rates for Customs Searches**

	1998			2000		
	# Searches	# "Hits"	% "Hit"	# Searches	# "Hits"	% "Hit"
White	11,765	677	5.8	2,931	462	15.8
Black	6,141	365	5.9	2,437	384	15.8
Latino	14,951	209	1.4	2,731	358	13.1

Although no evidence supports the existence of a correlation between race and crime in the context of the traffic, pedestrian, and Customs stops examined to date, even evidence of the existence of such a correlation would not justify the use of race or ethnicity to stop individuals. Using such correlations hinders the effectiveness of law enforcement because it both prevents law enforcement from isolating dangerous suspects who might not possess those characteristics and hinders law enforcement-community relations.

When law enforcement concentrates on a particular race or ethnic group, it overlooks others with a propensity to commit such crime. For example, in the War on Terrorism, the repeated emphasis on Arab Al Qaeda members distracts law enforcement from concentrating on other potential terrorists who are not Arab, but who exhibit the potential behavior of a terrorist. The recent arrests of Richard Reid, Jose Padilla, and John Walker Lindh, and the bombing of a nightclub in Bali by Asian Al-Qaeda operatives demonstrate the importance of law enforcement focus on a broad array of factors, with an emphasis on using reliable intelligence to look for potential terrorists rather than the needle-in-a-haystack approach of focusing predominantly on race or ethnicity. As one reporter has noted:

Consider the four most famous accused terrorists in custody today: John Walker Lindh, a white American; Zacarias Moussaoui, an African with a French passport; Richard Reid, a half-West Indian, half-Englishman with a British passport; Jose Padilla, a Hispanic American. They are all Muslim, but that broadens the category to the point of uselessness.<sup>64</sup>

Additionally, the use of race in multi-factor profiles by law enforcement creates bad public policy, as it engenders tremendous frustration, anger, and hostility from communities of color. Clearly, the onus that accompanies constant suspicion by law enforcement takes a mental toll on people of color. Professor Barbara Underwood noted the cumulative effect on people of color, stating "[b]y repeatedly excluding from various benefits the members of the same well-defined group,

64. Fareed Zakaria, *Freedom vs. Security*, NEWSWEEK, July 8, 2002, at 27, 30 (arguing against the use of racial profiling in the war on terror because it will harm the government's ability to get information from these groups).

the practice contributes to the formation of a discrete disadvantaged class, whose members share a massive sense of injustice.”<sup>65</sup> Even more troubling is the idea that when the community is not invested in the justice system, law enforcement has more difficulty tapping into the community as a resource for invaluable intelligence information.<sup>66</sup> Although some may argue that the anger triggered in the targeted community comes with the territory during pressing times, the reality is that the focus on one particular community or race can be detrimental.<sup>67</sup> For example, in the War on Terrorism, rather than targeting all Arabs with suspicion, law enforcement should work in conjunction with Arab and Muslim communities to identify individuals whose behavior arouses suspicion and warrants investigation. This approach not only produces sounder community relations, but also results in much more effective law enforcement.

## 2. *Exception for Suspect-Specific Identifications*

Although race, ethnicity, or national origin should not be used based on the perception of a general or circumstantial correlation between race and crime, an exception is created when a specific past crime has been committed and a victim or witness provides a detailed physical description of the perpetrator that includes race, nationality, or ethnicity as one of multiple characteristics that can narrow the field of suspects. The multiple variables must contain particular, credible, and distinctive facts, characteristics, or behavior beyond race, ethnicity, national origin, and/or gender alone.

For example, if a taxi driver has been held up by a person described as a black male in his twenties who was wearing a blue shirt, the law enforcement officers scouring the immediate area to apprehend the suspect will focus on those qualities and will not focus on persons who are white, female, elderly, or wearing red or yellow shirts. Reasonably, the set of people in the immediate area who the police may wish to stop and question as possible suspects are only those who fit the description of black, male, young, and wearing blue shirts. Consequently, a reliable, detailed suspect description that includes the race, nationality, ethnicity, or gender of the perpetrator allows the police to use these factors in identifying the set of persons who may be suspects.

Law enforcement officers might use a suspect-specific description in three of the four law enforcement stops discussed earlier. They may decide to use consensual stops to question anyone and everyone matching the description. Alternatively,

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65. Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1435 (1979) (discussing the fairness of different methods used to predict individual behavior in the selection of applicants).

66. See generally *id.*

67. See generally Wesley Skogan & George Antunes, *Information, Apprehension, and Deterrence: Exploring the Limits of Police Productivity*, 7 J. CRIM. JUST. 217 (1979).

after observing the behaviors of a potential suspect who matches the description, law enforcement may stop him or her based on reasonable articulable suspicion or probable cause—a criminal predicate stop. Finally, police officers may choose to use motor vehicle pretext stops in order to question and possibly search individuals matching the description. Using either consensual or pretext stops in this situation can be effective only if the information is reliable and credible, and only if relatively few people share the race, ethnicity, or nationality of the perpetrator. Otherwise, law enforcement will have too many suspects and will spend valuable time questioning many innocent people.

For example, if a nursing home patient identifies an assailant as a young white male, that information could limit the number of possible suspects if the police sealed the nursing home before the perpetrator could flee and if the vast majority of the nursing home patients and staff were elderly, female, or black. The information becomes less valuable if the staff consists primarily of young males, or if the perpetrator had time to flee on foot into the surrounding neighborhood before the police could arrive. Indeed, the more potential suspects who match the general description, the less valuable the information becomes. When many people in the area in which the crime occurred share the characteristics of a suspect-specific description, the information is virtually useless in determining whom to stop and question. The only value in such information lies in determining who need not be stopped and questioned.

Stated differently, if a crime were to occur in Fenway Park in Boston, information that the criminal wore a Los Angeles Dodgers baseball cap may be extremely helpful in locating the perpetrator among the crowd as there should only be a limited number of Dodgers fans at Fenway during any one game. However, information that the criminal was wearing a Boston Red Sox cap would be essentially useless—it would provide the police with too many suspects. At most, such information would be useful only to help the police eliminate as suspects anyone not wearing a Red Sox cap.

If race were a neutral characteristic, such as the hat one wears to a baseball game, the appropriateness of relying on race as a basis for questioning potential suspects would depend upon the number of potential suspects who share that characteristic, the availability of better leads, and the severity of the criminal conduct being investigated. If we take the example from above about a crime committed in Fenway Park, we know that the police would likely not waste their time questioning fifty fans wearing a Los Angeles Dodgers cap if the person wearing that cap had simply stolen a souvenir, but would think the time well spent if that person had committed a murder. The police might find the perpetrator and there would be few consequences to stopping all individuals wearing a Dodgers cap.

However, race, ethnicity, and national origin, unlike baseball caps, are not neutral. Indeed, these traits are immutable and permanent; therefore the decision



whether to use these as identifying characteristics when conducting stops and searches carries with it many consequences much more damaging and far-reaching than a few angry Los Angeles Dodgers fans.

### *3. Exception for Crime-Specific Investigations*

A second exception in which law enforcement may permissibly use race, ethnicity, or national origin is when police receive specific, credible information linking the race of certain suspects to a particular future crime under investigation. For example, if the police receive reliable and specific information that three Arab men will be attempting to blow up the San Francisco Bay Bridge sometime in the next week, police may use race as part of a multi-variable profile because there is concrete evidence linking race to a particular future crime. Concrete evidence linking a suspect to a crime must be reliable and credible, and can be derived from specific intelligence, informant information, witness information, or other credible sources.

Although under such circumstances concrete evidence may link race to a particular future criminal incident, there are restrictions to law enforcement's use of race. For instance, this strategy is effective only when it is implemented at a specific location for a short, specified duration of time. Prior to implementing such a strategy, law enforcement must assess its impact on community relations and should also examine the number of innocent people that might be questioned, stopped or searched. Indeed, in our example, if a predominantly Arab community resides near the San Francisco Bay Bridge, then adding "Arab" as part of a profile will not narrow the pool of suspects in any meaningful way. Moreover, a broad, sweeping profile such as the one used in this example would be largely ineffective and simply would violate the civil rights of too many innocent people. In addition, other, more effective, race-neutral strategies, such as focusing on persons exhibiting suspicious behavior, would be more productive than simply targeting an entire community.

## IV. EXAMPLES: EFFECTIVENESS AND IMPACT

### *A. Oneonta, New York*

The prohibitions and exceptions in this Article's definition provide guidelines that law enforcement can follow in conducting investigations. Failing to follow these guidelines can lead to less effective investigations as well as to damage of relations with communities. Two recent incidents highlight the danger of not following this definition, or of taking its exceptions too far.

After an incident in September 1992, the police department and town of Oneonta, New York, learned first-hand the dangers of using race in police actions in terms of both effectiveness and the damage it can do to a community. Oneonta is

a small college town in upstate New York. At the time of the incident, it had roughly 10,000 full-time residents, of which fewer than 300 were black, and 7500 students, of which only approximately 150 were black.<sup>68</sup> Shortly before 2:00 a.m. on September 4, 1992, an elderly woman was attacked in her home.<sup>69</sup> She told the police that although she did not see her assailant's face, she believed he was a black male, based on her view of his hand and forearm, that he was young, because he crossed her room quickly, and that he carried a knife.<sup>70</sup> In addition, the woman said that the assailant had cut himself on the hand when they struggled.<sup>71</sup> The police, relying on the woman's description, attempted to locate and interview every young black male on campus, and, finding no suspects, stopped and questioned the black residents of the town, looking for a young black perpetrator with a cut hand.<sup>72</sup> More than two hundred blacks were questioned over the next several days, but no suspect was apprehended.<sup>73</sup>

This sweep of the town's black community led to a class action suit against the town of Oneonta brought by its black residents alleging a violation of their civil rights because they were selectively stopped and questioned in the investigation. The suit ultimately failed on Equal Protection Clause grounds.<sup>74</sup> The Second Circuit held that, because the targeting of black males for questioning by the police had resulted from a victim's description that included race and gender and because there was no evidence of discriminatory racial animus, the police conduct did not violate the Equal Protection Clause.<sup>75</sup> While the Second Circuit expressly amended its decision to limit its holding to the circumstances present in that case, one can reasonably infer from the decision that, as long as there is no discriminatory intent, it is permissible under the Equal Protection Clause for the police to question a substantial number of persons in the vicinity of the crime based on their race and gender when the physical description of the perpetrator provides little more information than his or her race and gender. What is not clear is whether there is a line beyond which police questioning of persons whose race matches the physical description of the suspect will violate Equal Protection Clause. The Second Circuit expressly deferred this question, declaring that it would wait for the appropriate case before drawing such a line.<sup>76</sup>

Under the definition outlined in this Article, the investigatory sweep of Oneonta's black community would not have been permitted. Race and gender alone, the

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68. *Brown v. City of Oneonta*, 221 F.3d 329, 334 (2d Cir. 2000).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Brown v. City of Oneonta*, 221 F.3d 329, 336 (2d Cir. 2000).

75. *Id.* at 337-38.

76. *Id.* at 339.

two characteristics on which the police relied to conduct their investigation, would not be enough to constitute a “suspect-specific description,” especially since the suspect was not confined to a specific location.<sup>77</sup> The Second Circuit was plainly ill at ease with its holding considering its decision barely evaded en banc review.<sup>78</sup> The court acknowledged that it understood how upsetting the actions of the police were to the innocent plaintiffs and what kind of impact such a sweep of all black males would have on community relations.<sup>79</sup> Indeed, the court expressly declared that its “role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause.”<sup>80</sup>

Although it survived the equal protection challenge, there is little doubt that the broad search of 200 black males in a community where blacks comprise less than five percent of the permanent and student population was an ineffective investigatory technique and damaging to the community. Word of the sweep likely would travel quickly in a small town, so that any black person with such a cut would quickly leave town. Thus, it is hardly surprising that this sweep failed to turn up the assailant. In terms of relations with the black community, even the Attorney General of New York State, who argued the appeal on behalf of the town of Oneonta, admitted, “We won the case, but it makes your skin crawl.”<sup>81</sup> Targeting an entire town’s black population as suspects in a vicious assault plainly risks poisoning law enforcement’s relationship with the black community.

Consequently, while it may be lawful to use race when searching for a perpetrator of a serious crime, the situation in Oneonta demonstrates that it is most often ineffective to use race because the assailant was never found. The Oneonta situation also demonstrates that the use of race can damage community relations and render a targeted community unwilling to cooperate with law enforcement in solving other crimes.

This case also illustrates the folly of attempting to stop or question every person who fits a general description such as “young black male” without relying on any more specific and readily identifiable characteristics. To do so allows police to focus almost exclusively on the racial element of the victim’s description. Instead, police might have employed other strategies such as contacting all hospitals in or

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77. Although the police also had information that the assailant had a cut on his hand, they stopped and questioned all the young, black males in the entire town, so those stops were based only on race, age, and gender. *Id.* at 334.

78. *Brown v. City of Oneonta*, 195 F.3d 769 (2d Cir. 2000) (denying en banc review for lack of majority support).

79. *Brown*, 221 F.3d at 339.

80. *Id.* In addition, while none of the stops violated the Equal Protection Clause, the Second Circuit ruled that some of them violated the Fourth Amendment because there was no reasonable articulable suspicion and/or no probable cause for the stop. *Id.* at 340-41.

81. Bob Herbert, *Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, at A29.

around Oneonta to inquire whether any young black men had requested treatment for a hand wound, targeting intelligence efforts in the black community on the assumption that persons in the African-American community might be more likely to possess information about a young, black male with a wounded hand, or conducting visual surveillances to locate any African-Americans with injured hands. Such strategies would not arouse the ire of the community and may have been more successful. The use of race in these ways, therefore, would not be considered racial profiling because the police would be working with the community to find a specific individual and would be relying first and foremost on a much more limiting characteristic—cuts on a person's hands—and using race only to eliminate potential suspects from the likely very small group of individuals with cuts on their hands.

### *B. Baltimore, Maryland*

Another example of how the inappropriate use of race is both ineffective and disruptive to community relations is a February 2002 incident in Baltimore, Maryland, in which an African-American male raped a woman at a bus stop. Upon receiving notification of the crime, Major Donald Healy, then-commander of the Northeast District precinct, issued a memorandum to all officers to stop “every black male around this bus stop . . . until the subject is apprehended.”<sup>82</sup> Officers, unable to narrow the suspects because of the lack of information about age, height, weight, or clothing description, responded accordingly by stopping all black males passing through the bus stop. Not surprisingly, this overly broad instruction resulted in no suspect arrests and served only to outrage the Baltimore community. Baltimore lawmakers, including Sen. Nathaniel McFadden, called the directive “outrageous” and “totally unacceptable,” noting, “it is racial profiling at its worst.”<sup>83</sup> As a result of the community outrage, Major Healy announced his retirement shortly after the memorandum was rescinded.

### *C. The Pre-September 11 Investigations in Phoenix and Minneapolis*

In the months preceding the September 11 attacks, information about two FBI field office investigations of U.S. flight schools further illustrates the risks inherent in using a race-based profile to identify potential criminals. Indeed, the pre-September 11 investigations of U.S. flight schools based out of both the Phoenix and Minneapolis FBI field offices led law enforcement officials to suspect Al Qaeda members might be training at U.S. aviation schools but resulted in no

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82. Wiley Hall III, *Profile in Stupidity*, BALTIMORE CITYPAPER ONLINE, Mar. 13, 2002, at [http://www.citypaper.com/2002-03-13/pf/urban\\_pf.html](http://www.citypaper.com/2002-03-13/pf/urban_pf.html).

83. Jaime Hernandez, *Baltimore Officer Resigns Over Memo*, ADVOCATE, Mar. 6, 2002, at <http://dpa.state.ky.us/library/advocate/may02/balt.html>.

affirmative steps to halt the threat. When later questioned about why the investigations led to no further action by the FBI, the FBI claimed that concerns about being perceived as racial profilers hindered its ability to act on this information. It is our position that fears of perceptions that the FBI was racially profiling had nothing to do with the FBI's failure to pursue leads contained in the two memoranda; rather, it was the FBI's own internal mishandling of the cases that led to missteps. Moreover, had the FBI adopted race-neutral and behavioral-based strategies during the course of its investigations, the investigations would have yielded even more definitive results, which likely would have provided important information about the looming terrorist threats.

### *1. The Phoenix Counter-Terrorism Investigation*

Prior to September 11, FBI agents in Phoenix targeted a small group of Middle Eastern men in a counter-terrorism investigation when they discovered that several of them were enrolled at a flight school at Embry-Riddle Aeronautical University in Prescott, Arizona.<sup>84</sup> The suspects under investigation were all studying various programs in civil aviation engineering, airport operations and pilot training.<sup>85</sup> The several-page memorandum written by FBI agent Kenneth Williams, dated July 10, 2001, remains classified. However, in May 2002, the FBI provided the U.S. Senate Judiciary Committee with the following excerpt:

Phoenix believes that the FBI should accumulate a listing of civil aviation universities/colleges around the country. FBI field officials with these types of schools in their area should establish appropriate liaison. FBIHQ should discuss this matter with other elements of the U.S. intelligence community and ask the community for any information that supports Phoenix's suspicions. FBIHQ should consider seeking the necessary authority to obtain visa information from the [U.S. Department of State] on individuals obtaining visas to attend these types of schools and notify the appropriate FBI field office when these individuals are scheduled to arrive in their area of responsibility.<sup>86</sup>

At least one source close to the investigation claims that the memorandum proposed a sweep of Middle Eastern students at flight schools.<sup>87</sup> While we do not believe that such a sweep would have been effective, the Phoenix office's initial targeting of specific individuals who exhibited a particular behavioral profile, rather than broadly looking at all Arabs in flight schools, was a more effective means of investigation. Given the large number of potential suspects, i.e., persons

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84. Dan Eggen, *Aviation Students Were Monitored Before Sept. 11th*, WASH. POST, May 4, 2002, at A13.

85. *Id.*

86. *Reforming the FBI In the 21st Century: Reorganizing and Refocusing The Mission: Hearing of the Senate Judiciary Comm.*, 107th Cong. (2002) (statement of Patrick Leahy, Chair, Senate Judiciary Comm.).

87. Michael Elliott, *Al-Qaeda Now*, TIME, June 3, 2002, at 39.

remotely resembling an Arab at U.S. flight schools, a race-based profile would have been largely ineffective in rooting out potential terrorists. Indeed, not only would such a broad sweep have targeted many innocent persons, but it also would have blinded FBI officials to any non-Arab suspects.

## 2. *The FBI Field Office Investigation in Minneapolis*

Also prior to September 11, the Minneapolis field office of the FBI launched an investigation after an instructor at the Pan Am International Flight Academy became suspicious of one of his students, Zacarias Moussaoui, an African with a French passport. The flight instructor's suspicions were aroused when Moussaoui began to behave in ways that were atypical of other flight students: Moussaoui paid his tuition with \$6800 in cash;<sup>88</sup> he wanted to learn to fly large commercial jets, but appeared inept at basic flying techniques;<sup>89</sup> he indicated that he only wanted to learn to turn large commercial jets, but was uninterested in learning how to take off or land.<sup>90</sup> In addition, although Moussaoui claimed he was from France, he was unable to respond in French to questions posed to him in French, claiming that he was not fluent and adding that he was from the Middle East. Further inquiries about his background from persons at the flight school drew increasingly belligerent responses from Moussaoui.<sup>91</sup>

Shortly thereafter, a flight instructor working with Moussaoui contacted an FBI agent in the Minneapolis field office, warning them of his suspicions that Moussaoui was a terrorist, and expressing his concerns that Moussaoui was focused on learning to fly jumbo jets.<sup>92</sup> The instructor pointedly told the FBI agent, "Do you realize how serious this is? This man wants training on a 747. A 747 fully loaded with fuel could be used as a weapon!"<sup>93</sup>

Although suspicions were raised about Moussaoui's behavior at the flight school well before the attacks, he was arrested only shortly before September 11, 2001.<sup>94</sup> The "inexplicable" mishandling of the Moussaoui case, particularly the extensive efforts by the FBI's Washington headquarters to block a search warrant for Moussaoui's residence, is yet another example of the need for law enforcement to rely on suspicious behavior and credible intelligence rather than race in investigat-

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88. David E. Sanger, *No Hint of Sept. 11 in Report in August, White House Says, But Congress Seeks Inquiry, Answer to Critics*, N.Y. TIMES, May 17, 2002, at A1.

89. Greg Gordon, *Eagan Flight Trainer Wouldn't Let Unease About Moussaoui Rest*, STAR TRIB. (Minneapolis), Dec. 21, 2001, available at <http://www.startribune.com/stories/1576/913687.html>.

90. *Failure To Act on Intelligence Reports Shows Difficulty of Assessing Threats*, KNIGHT-RIDDER TRIB. BUS. NEWS, May 17, 2002, available at 2002 WL 21246384.

91. Gordon, *supra* note 89.

92. *Id.*

93. *Id.*

94. Philip Shenon, *Flight School Warned F.B.I. of Suspicions*, N.Y. TIMES, Dec. 22, 2001, at B1.

ing potential terrorists.<sup>95</sup>

### 3. *Applying the Definition of Racial Profiling to These Investigations*

After September 11, concerns about the mishandling of the Phoenix and Minneapolis investigations have led to criticism about the FBI's failure to follow up on the critical leads presented. Indeed, it has become more apparent that the FBI could have pursued these leads without engaging in racial profiling. Clearly, such an investigation would have been compelled to focus on intelligence information and reports of suspicious behavior to be successful and would not have fallen within the suspect-specific exception to the use of race as part of a profile.

First, while foreign students make up between three percent (Embry-Riddle in Prescott, Arizona) and eighty percent (Florida Flight Training Center in Venice, Florida) of flight school students, many of the foreign students enter these flight facilities as employees of well-established airlines and they have legitimate careers in aviation.<sup>96</sup> Thus, FBI agents could have focused on all foreign flight students and asked field agents to examine those students whose applications were unaffiliated with any established airline. Second, FBI agents could have worked directly with air flight school trainers to identify and focus on those exhibiting suspect behavior and characteristics. Third, given that tuition at such schools is expensive, typically costing \$10,000 or more, with most students typically paying by check or credit card, did the student pay for the flight lessons in cash?<sup>97</sup> Fourth, given that most students training to fly a plane weighing at least 12,500 pounds, a weight level that includes most business jets and airliners, have already mastered some basic flying techniques, an important question was whether students seeking to fly such planes had prior flight training, possessed a mastery of basic knowledge of flight mechanics and techniques and were familiar with handling some type of aircraft.<sup>98</sup> Finally, it was critically important to have considered whether, during the course of students' training, they made statements seemingly inconsistent with their enrollment application. Field agents utilizing these types of race-neutral inquiries probably could have pursued the leads in the Phoenix and Minneapolis memoranda more efficiently and more effectively, without raising concerns that they were engaging in racial profiling.

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95. Philip Shenon, *Secret Court Says F.B.I. Aides Misled Judges in 75 Cases*, N.Y. TIMES, Aug. 23, 2002 at A1; see also Philip Shenon, *Senate Report on Pre-9/11 Failures Tells of Bungling at F.B.I.*, Aug. 28, 2002, at A14.

96. David Firestone & Matthew Wald, *Flight Schools See Downside to Crackdown*, N.Y. TIMES, May 27, 2002, at A1.

97. See generally Embry-Riddle, *Embry-Riddle Financial Aid Information*, at <http://www.erau.edu/0Universe/05/05fastfacts.html#assistance> (last visited Feb. 15, 2002) (stating tuition is \$10,350 per semester); Shenon, *supra* note 94, at B1.

98. Shenon, *supra* note 94, at B1; Firestone & Wald, *supra* note 96, at A1.

## V. APPLYING THE DEFINITION TO POST-SEPTEMBER 11 CONCERNS

Since the September 11, 2001 attacks on the Pentagon and the World Trade Center towers, racial profiling has taken on new significance and has left people who were previously committed to eradicating racial profiling less sure of where they stand.<sup>99</sup> A practice that once was considered by many to be a blatant civil rights violation is now accepted by some as a necessary tactic during a time of terrorism.<sup>100</sup> Since the attacks, Arab-Americans have been singled out for security checks, questioning, and other investigations not because of suspicious activities, but because of skin color, clothing, name, or national origin.<sup>101</sup>

For instance, on October 8, 2001, Muhammed Ali, a Pakistani-born engineer with Lucent Technologies, boarded an airplane in Boston en route to his home in Washington, D.C., but, minutes before take-off, airline security called him from the airplane and waiting FBI agents interviewed him, checked his background, and ultimately declared him safe to fly. The pilot, however, refused to permit Ali to fly on his airplane, and directed a flight attendant to block the entrance when Ali tried to return. He returned home on another flight three hours later.<sup>102</sup>

Similarly, on December 24, 2001, Walied Shater, a Secret Service Agent of Arab descent assigned to President Bush's detail, was attempting to rendezvous with the President in Texas when the American Airlines flight he was scheduled to travel on

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99. See, e.g., *Morning Edition: Use of Profiling to Discover Would Be Terrorists*, *supra* note 1 (Yale Law School Professor Peter Schuck, stating, "There's no question, it seems to me, that we use stereotypes, that we have to use stereotypes and the question is: How good are they? But over time, the stereotypes on which we base profiling ought to become more refined and more targeted"). Professor Turley of George Washington University Law School noted,

There are 40 million people that travel by air in this country. We cannot stop each one of them and make an individual determination of risk. We have to develop some type of profile. The fact is profiling is a legitimate statistical device. And it's a device that we may have to use if we're going to have a meaningful security process at these airports.

*Id.* For further discussion of Professor Turley's views, see Ken Leiser, *Ethnic Profiling at Airports Gains Supporters*, ST. LOUIS POST-DISPATCH, Apr. 11, 2002, available at <http://archives.californiaaviation.org/airport/msg20841.html>.

100. Cf. Norman Y. Mineta, Statement Before the U.S. Comm'n on Civ. Rights, Briefing on Boundaries of Justice: Immigration Policies Post-September 11 (Oct. 12, 2001):

While safety and security are of the highest concern to [the Department of Transportation], we also understand the nature of the Nation our efforts are designed to protect: a society that respects civil and constitutional rights and cherishes the values of equal justice and equal opportunity. As one of the 120,000 Americans of Japanese ancestry interned by the United States government during World War II, I know firsthand the dangers with which we are presented in the current crisis. All of us will face heightened security in the aftermath of September 11, but the security and scrutiny must never become pretexts for unlawful discrimination.

101. See e.g., Stoughton, *supra* note 2, at A1 (discussing incidents of bias by airline employees against people of Arab descent in the wake of Sept. 11).

102. Corey Dade, *Despite New Guidelines, Fliers Raise Bias Issues*, BOSTON GLOBE, Feb. 2, 2002, at B1.



broke down.<sup>103</sup> Shater was then rebooked onto another flight. Shortly after he took his seat, however, airline personnel asked him to deplane for further security screening. He was told he could leave his personal items onboard. Finding it suspicious that Shater had left his belongings in the overhead bin, even though he had been told to do so, one of the flight attendants searched Shater's belongings. When she discovered an English-language book on Arab subject-matter, she informed the pilot of what she had found and noted that Shater was acting "strangely." The pilot went to talk to Shater at his seat and later described Shater as "nervous and anxious," and "belligerent and threatening." The pilot's description of Shater directly contradicted statements from fellow passengers who described Shater as behaving normally. The pilot then had Shater deplane while he attempted to verify Shater's Secret Service credentials.<sup>104</sup>

In another case, an Indian-American motorist traveling with his two daughters and cousin was stopped by a Maryland State Trooper. The trooper stated that he had pulled them over for a traffic violation and he issued him a ticket for broken taillights. The trooper then proceeded to question the family about their national origin, asking for proof that they were actually from India and, because he believed that they were actually Arab terrorists, accusing them of lying. Eventually, the officer ordered them out of the car, which he then searched. He discovered a knife in the toolbox and arrested the driver, claiming that he had been carrying a butcher's knife on his person.<sup>105</sup>

Although there was some general indignation over these three incidents, the use of racial profiling to fight terrorism has received increasing support from the American public. According to a Gallup Poll, forty-nine percent of Americans would support a practice of Arabs and Arab-Americans, United States citizens or not, being forced to carry a special identification card; fifty-eight percent would support requiring Arabs to undergo more security checks at airports.<sup>106</sup> In a Los Angeles Times poll, sixty-eight percent said that law enforcement should be allowed to randomly stop people who fit the profile of suspected terrorists.<sup>107</sup> One Massachusetts State Trooper assigned to security at Boston's Logan Airport described the practice this way:

It's the only way to get the job done. In such a state of national emergency, . . . worrying about profiling is just naïve. If Arabs or Muslims are being stopped,

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103. Darryl Fears, *Turbulence on Flight 363: Prudence or Profiling: Secret Service Agent Rebutts Airline Account of Boarding Clash*, WASH. POST, Jan. 13, 2002, at A3.

104. *Id.*

105. AM.-ARAB ANTI-DISCRIMINATION COMM., *THE SEPTEMBER 11 BACKLASH: ANTI-ARAB/ANTI-MUSLIM HATE CRIMES, DISCRIMINATION AND HARASSMENT* 40 (Dec. 3, 2001).

106. *Morning Edition: Reactions People are Having to Suddenly Being Suspicious of Anyone Who is Muslim or Arabic* (NPR radio broadcast, Sept. 20, 2001), available at LEXIS.

107. *Id.*

searched, or inconvenienced more than others . . . they and the civil rights groups, like the ACLU, will just have to understand. To hell with the ACLU. They've got to take a backseat. They've got to take an aspirin and get over it because people's lives are at stake.<sup>108</sup>

In a society in which all citizens are constitutionally protected from unreasonable stops and searches, the support for targeting individuals based on appearance is troubling.<sup>109</sup>

Taking a closer look at profiling post-September 11, we see that the Al Qaeda situation seemingly differs from prior racial profiling in two respects. First, law enforcement has identified a particular criminal organization whose members are comprised almost entirely of Muslims, including Arabs, Africans, and Asians. Second, Al Qaeda's terrorist activities represent a much greater risk to our country than a shipment of drugs. To what extent should this magnified risk and the identification of a specific criminal conspiracy affect the definition of racial profiling?

At first glance, it may seem that this situation is similar to cases like *Oneonta* or the Baltimore rape case, in which victims identified a suspect in a past crime and provided law enforcement with a description of the suspect's race, age and gender. Upon closer examination, however, the identification of Al Qaeda as a group comprised predominantly of Muslims and Arabs differs from a suspect-specific identification in several ways. First, in criminal investigation such as those in *Oneonta* or Baltimore, police were searching a particular place for one particular person who had committed a particular crime. Second, their search lasted for a few days and was focused on finding evidence about past criminal activity.

In contrast, while the War on Terrorism had a bright-line beginning—September 11, 2001—it has no fixed endpoint. The search for Al Qaeda terrorists may go on for years. Moreover, the focus of the Al Qaeda investigation is on the prevention of future crimes that may occur at any time and anywhere in the world where American interests are present. While the race, age, and gender of a suspect along with some distinctive characteristics could, given a fixed location and a relatively short time period after the crime, reasonably narrow the class of suspects, the

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108. *Morning Edition: Arabs and Muslims Complaining of Racial Profiling and Harassment after Sept. 11th Terrorist Attacks* (NPR radio broadcast, Sept. 25, 2001), available at LEXIS.

109. See Norm Parish, *Blacks Say Profiling of Arabs is Racism; Polls Show Many Favor Scrutiny After Hijackings*, ST. LOUIS POST-DISPATCH, Oct. 17, 2001, at C1. National Urban League president Hugh Price was troubled by polls showing support for racial profiling in the wake of Sept. 11. He stated,

We should see in these polls' findings more evidence of the perniciousness of racial profiling itself, no matter how it's seemingly bolstered by glib or urgently declared rationalizations . . . . These polls show that whenever people speak up in favor of racial profiling, they always favor its use against some other group, not theirs.

*Id.*

search for Al Qaeda members is not limited by a particular time frame, location, or description of one individual. Using race, ethnicity, or nationality in this more amorphous context greatly diminishes its usefulness in narrowing the class of suspects.

While no empirical data has been produced regarding the effectiveness of racial profiling in the post-September 11 era, both expert opinion and anecdotal evidence support the proposition that racial profiling is largely ineffective in identifying potential terrorists. Following the September attacks, five intelligence specialists for the nation's leading law enforcement and terrorism agencies produced "Assessing Behaviors," a memo warning against relying on race or national origin rather than behaviors to identify potential terrorists.<sup>110</sup> One of the specialists who drafted the confidential memo stated with certainty, "'believing that you can achieve safety by looking at characteristics instead of behaviors is silly. If your goal is preventing attacks . . . you want your eyes and ears looking for pre-attack behaviors, not characteristics.'"<sup>111</sup> Another specialist added, "Why are we in the situation we are in [after the attacks]? We were paying attention to a set of characteristics, instead of a set of behaviors that launch an attack."<sup>112</sup> In the end, "security lies in the hard work of watching for suspicious behavior, not for suspicious people."<sup>113</sup>

The use of nationality in the case of the War on Terror is most similar to law enforcement's use of national origin in dealing with La Cosa Nostra ("LCN"), also known as the Mafia.<sup>114</sup> LCN permitted only Italians to be "made members"—members who have agreed to become management rather than mere soldiers—much as Al Qaeda is comprised almost entirely of Arab or Muslim members.<sup>115</sup> In combating these criminal organizations, how should law enforcement use national origin? This question can be explored by looking at several investigative strategies that derive from the stop and search framework outlined earlier.

Even in the years when LCN was strongest and its membership at its peak, those affiliated in any way with LCN still comprised an extraordinarily small percentage of Americans of Italian, even southern Italian, ancestry.<sup>116</sup> Similarly, although

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110. Bill Dedman, *Memo Warns Against Use of Profiling As Defense*, BOSTON GLOBE, Oct. 12, 2001, at A27 (disclosing memo by senior U.S. intelligence specialists urging law enforcement, when targeting terrorism suspects, to look at behavior instead of personal characteristics).

111. *Id.*

112. *Id.*

113. *Id.*

114. La Cosa Nostra is an organization of Italian families who work together in ongoing criminal enterprises such as gambling, murder for hire, drug trafficking, and extortion.

115. Prior to September 11, this kind of group racial profiling occurred also in dealing with gangs, such as the Crips (all Latino members) and the Bloods (all black members). See VERNIERO & ZOUBEK, *supra* note 56, at 78-80.

116. The Italian world population is approximately 59 million. Those of Italian ancestry in the U.S. comprise 11.29 million. U.S. CENSUS BUREAU, SELECTED CHARACTERISTICS FOR PERSONS OF ITALIAN ANCESTRY: 1990 (Feb.

there are three million Arab-Americans and roughly 300 million Arabs in the world, only a fraction of these are members of Al Qaeda or believe in the use of terrorism to accomplish their goals.<sup>117</sup> These numbers clearly indicate that any use of national origin in policing tactics designed to decrease the threat of terrorism and/or criminal mafia activities must take into account that the vast majority of individuals sharing this characteristic are law-abiding citizens. Thus, to be effective, law enforcement must be able to identify those most likely to be suspected of criminal or terrorist activity.

Under these circumstances, of the five types of law enforcement stops—truly voluntary encounters, the judicially deemed “consensual encounter,” criminal predicate, border, and pretext—the consensual stop will be virtually useless if based solely or predominantly on national origin. If a law enforcement officer were to stop someone on the street to question that person about criminal or terrorist activities solely or predominantly because he or she were Arab, over ninety-nine percent would have no information to provide. This would result in extremely ineffective investigations, wasting scarce and valuable resources on interrogating a vast majority of innocent people with no useful information. Indeed, this tactic is so extreme that it is likely that no law enforcement agency would use it in any serious way. Rather, law enforcement likely would focus on race, ethnicity, or national origin in other ways.

First, law enforcement could use special investigative efforts on those persons already suspected of criminal activity who are also of the national origin at issue. It could then use either consensual or criminal predicate stops and searches to further the investigation and determine if the suspect is a member of the group in question, in this case Al Qaeda. Second, law enforcement may choose to use border stops more aggressively to ferret out potential Al Qaeda members, choosing to question and search all Arabs more intensively or to make Arab ancestry one variable of a multi-variable statistical profile used to determine whom to search more thoroughly. Third, law enforcement might look for opportunities to search drivers and their automobiles through the use of pretext stops. While one’s nationality can never provide an adequate predicate for even the most cursory searches, the police could look for other means to conduct searches, including arrests for minor motor vehicle violations, which would then permit a search of the person and the passenger area of the car incident to arrest, and, if the police temporarily took possession of the car, a more thorough inventory search of the vehicle back at the

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18, 1998), at <http://www.census.gov/population/socdemo/ancestry/Italian.txt>. Of these, only approximately 1000 were “made members” as of 1999. FBI, CINCINNATI DIV., ORGANIZED CRIME AND DRUGS, *available at* <http://cincinnati.fbi.gov/organize.htm> (last visited Feb. 18, 2003).

117. It is estimated that Al Qaeda may have several hundred to several thousand members worldwide—a tiny fraction of the millions of Arabs throughout the world. DUDLEY KNOX LIBRARY, NAVAL POSTGRADUATE SCHOOL, TERRORIST GROUP PROFILES: AL-QUAIDA, *available at* <http://library.nps.navy.mil/home/tgp/quaida.htm> (last updated Dec. 13, 2002).

station.<sup>118</sup> Finally, in addition to the use of the four identified types of police stops, law enforcement can also abandon the antagonistic use of race altogether by instead developing relationships with Muslim and Arab communities under the belief that Arabs and Muslims are more likely to possess information about Al Qaeda than non-Arabs and non-Muslims. A closer examination of these law enforcement strategies and the use of the four types of stops in the context of Al Qaeda more clearly reveals their potential efficacy and limitations.

The first strategy—focusing additional investigative efforts on specific persons of Arab decent or Muslims already suspected of criminal activity and using consensual or criminal predicate stops and searches on those individuals—could identify members of Al Qaeda effectively without raising significant civil liberties concerns because the predication for the criminal investigation is not the person's nationality but his or her alleged criminal conduct. The suspect's nationality or religion may affect the amount of resources allocated to the investigation and its intensity, but not the focus of the investigation itself. In short, law enforcement is not investigating someone because he is Arab or Muslim; it is simply devoting increased time and energy into the investigation of already identified criminals because they are Arab or Muslim. More specifically, law enforcement might use additional resources in investigating an Arab or Muslim criminal suspect to determine whether that individual is affiliated with Al Qaeda. Beyond that, the allocation of investigative resources would depend on whether any Al Qaeda affiliation is uncovered; if it becomes apparent that there is no such affiliation, then the suspect's national origin or religion would become irrelevant.

The second strategy—targeting those who appear to be Arab or Muslim for security stops at airports and border crossing searches—simply is not a viable law enforcement strategy. There are roughly 300 million Arabs in the world, three million of whom reside in the United States and a great number who will visit the U.S. at some point in their lives.<sup>119</sup> Thus, Arab nationality and the Muslim religion are variables too widely shared to be meaningful alone or as part of a multi-variable profile. Moreover, only an infinitesimal percentage of Arabs or Muslims can be expected to be Al Qaeda operatives, so looking for such operatives based solely or predominantly on their nationality is likely to be an ineffective, indeed a dangerous, strategy.

Adding to the difficulties of targeting Arabs is the fact that there is no such thing as a "Middle Eastern" look. The American-Arab Anti-Discrimination Committee ("ADC") explains: "'Arab' is a cultural and linguistic term. It refers to those who

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118. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 371-72 (2001) (O'Connor, J., dissenting) (discussing the implications of the Court's holding).

119. Am.-Arab Anti-Discrimination Comm., *Facts about Arabs and the Arab World*, at <http://www.adc.org/index.php?id=248> (last visited Feb. 13, 2003) [hereinafter *Facts about Arabs*] (providing general information on Arab history and culture).

speak Arabic as their first language. Arabs are united by culture and by history. Arabs are not a race. Some have blue eyes and red hair; others are dark skinned; many are somewhere in between.”<sup>120</sup> At the same time, many people who trace their heritage to Mexico, Greece, Italy, India, and Spain have a stereotypically “Middle-Eastern” look. Furthermore, attempts to conflate Arab ethnicity and the Islamic religion also fail, as the Arab world has a diversity of ethnic, linguistic, and religious communities given that not all Muslims are Arab;<sup>121</sup> in fact, only one of the ten countries with the largest populations of Muslims, Egypt, is an Arab country.<sup>122</sup> Indeed, it is Indonesia, and not one of the Arab nations, that has the largest number of Muslims. As the ADC states, “Most Arabs are Muslims, but most Muslims are not Arabs.”<sup>123</sup>

For these reasons, observations of a person’s apparent nationality or religion may not be a very useful addition to a multi-variable statistical profile that could be used at airports and border crossings to determine which persons would be more intensively searched and questioned. A multi-variable statistical profile is more reliable if it focuses on observable behavior as the predicate for the search or the questioning. Neither law enforcement nor fairness is served if apparent nationality or religion are the only or even the most predominant factors in a multi-variable profile.

Finally, it is important to consider how Al Qaeda will respond to the use of national origin and/or religion in a profile. Just as LCN adapted to “Italian” profiles by hiring non-Italian couriers to transport their contraband, it is clear that Al Qaeda already has begun to modify its modus operandi to confound those looking for its members.<sup>124</sup>

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120. *Id.*

121. It is estimated that only twelve percent of the 1.2 billion Muslims worldwide are Arab. In fact, over twelve million Arabs are Christian and thousands are Jewish. *See generally 100 Questions and Answers about Arab Americans: A Journalist's Guide*, DETROIT FREE PRESS, available at <http://www.freep.com/jobspage/arabs/arab7.html> (last visited Feb. 13, 2003) (providing general background information on Arab-Americans).

122. *Facts about Arabs*, *supra* note 119.

123. *Id.*

124. The recent bombing of a Bali nightclub frequented by Australian tourists highlights the fact that Al Qaeda operatives are not uniquely Arab or Middle Eastern, and include many Southeast Asians, who we believe will become more frequently used to carry out Al Qaeda plots both in the United States and abroad. Indeed, Al Qaeda began to organize its cells in Southeast Asia long before carrying out the September 11 attacks, and its stronghold in the region continues to grow. *See Maria Ressa, Operative Details Al Qaeda's Asian Expansion*, Sept. 17, 2002, at <http://edition.cnn.com/2002/WORLD/asiapcf/south/09/16/al.faruq.profile/>; *see also Uncovering Southeast Asia's Jihad Network*, Nov. 7, 2002, at <http://www.cnn.com/2002/WORLD/asiapcf/southeast/10/29/asia.jihad.1/index.html>; Maria Ressa, *Building Al Qaeda's Asian Terror Network*, Nov. 7, 2002, at <http://www.cnn.com/2002/WORLD/asiapcf/southeast/10/29/asia.jihad.2>.

In addition, we can also look to Richard Reid, the so-called “shoe bomber,” a non-Arab British national who has a black father and a white mother. Reid was a British national. *See generally Al Qaeda is Seeking Non-Arabs, Learning New Languages*, HINDUSTAN TIMES, Feb. 7, 2002, available at <http://www.hindustantimes.com/nonfram/070202/dlame21.asp> (discussing evidence that Al-Qaeda sympathizers have reached out to non-Arabic Muslim populations seeking new recruits whose appearance might not draw suspicion); Eric Pianin & Bob Woodward,

The third strategy—conducting pretext searches on Arabs or Muslims—is no more likely than the second strategy to yield investigative rewards but it is far more likely to reap antagonism. To some degree, persons expect to be subject to searches and questioning before entering an airplane or crossing a border; they do not, however, expect searches and questions when they are simply walking down the street or driving a car. Moreover, pretext searches generate the additional antagonism that accompanies any act of hypocrisy. When innocent occupants are told that their car is being searched or impounded because of a motor vehicle violation, the occupants might be more inclined to believe that the true reason is one that is not articulated: race, ethnicity, or national origin. Such pretext searches can understandably poison a community's relationship with law enforcement and enjoy no compensating investigative benefit. Additionally, it is unclear what searching a member of Al Qaeda will uncover that would indicate criminal behavior. After all, if the September 11 terrorists were searched on the way to the airport, would the possession of box cutters have been an indication of the terror that was about to be committed? As with airport and border searches, conducting pretext searches of persons simply because they are Arab or Muslim would be a virtually useless law enforcement strategy because so few Arabs or Muslims are affiliated with Al Qaeda.

A final strategy, developing relationships with Arab or Muslim communities instead of antagonizing them, is perhaps one of the most promising. This kind of investigation raises few civil liberties concerns as long as the police rely on truly consensual encounters and human intelligence, rather than electronic surveillance or other more coercive intrusions. For law enforcement organizations, human intelligence means more than confidential informants, although certainly such informants are a key element in gathering information about who has participated in crimes that have been committed and who is planning new crimes. Mostly, human intelligence means that people from the community will report criminal and suspicious activities to the police and will freely and candidly answer police questions. As discussed elsewhere in this Article, the willingness of persons from the community to assist the police in this way depends greatly on whether law enforcement is seen as a friend or foe—an ally in fighting crime and doing justice or a hostile occupying force bent on harassing community members and their neighbors. Therefore, the better the police treat the vast majority of law-abiding members of a community, the better the community will treat the police in terms of information and cooperation.

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*Terror Concerns of U.S. Extend to Asia*, WASH. POST, Jan. 18, 2002, at A18 (U.S. intelligence agencies are concerned that new terrorists attacks may involve Asian or African terrorists in order to elude racial profiles); *CNN Int'l: Inside Asia* (CNN Int'l television broadcast, Jan. 26, 2002), available at 2002 WL 8469859; Suzanne Smalley, *The Youngest Mule*, NEWSWEEK, May 6, 2002, at 48 (noting incident in which U.S. Customs found a kilo of heroin in a five year old girl's suitcase).

Already, the information gleaned from these community partnerships has become invaluable to the War on Terror. Ralph Boyd, Assistant Attorney General for Civil Rights at the U.S. Department of Justice, underscored the importance of such partnerships when he addressed a gathering of Massachusetts's trial court judges in November 2001. After chronicling his efforts to prosecute many of the post-September 11 hate crimes against Arabs, he commented that the prosecution of these cases had unexpectedly resulted in a significant amount of useful intelligence about terrorists. Boyd made it clear that once the community members developed a relationship with his office and began to trust law enforcement, they began to supply valuable information.<sup>125</sup> The information provided by Boyd was incredibly useful to the FBI in their ongoing terrorist investigations.<sup>126</sup>

It is reasonable that persons affiliated with Al Qaeda likely would attempt to conceal themselves in Muslim or Arab communities in the United States. For this reason, the cooperation of Arab and Muslim communities is critical in locating these operatives and developing the information needed to prevent terrorist acts and to prove guilt beyond a reasonable doubt. Consequently, whatever law enforcement benefits are obtained by focusing on persons because they are Arab or Muslim must also consider the law enforcement costs involved if this community were to believe that it was being persecuted by law enforcement because of its practice of Islam or its national origin.

The greater magnitude of the risk further increases the argument that scarce law enforcement resources should be used in a way that maximizes their effectiveness. Thus, instead of trying to ferret out those of Arab appearance or Muslim religion, we should focus on some race-blind responses that could improve our ability to identify and detect terrorists and terrorist activity from any source and by any person. Perhaps, as in Israel, we should search all potential airline passengers with wands. Or we may need to interrogate randomly selected passengers about their travel plans. We ought to consider scanning all checked luggage, using more air marshals on planes, and securing cockpit doors. And, most importantly, law enforcement should identify the behaviors associated with terrorist activity and actively target individuals based on those behaviors.

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125. Interview with Judge Ralph Gants of the Mass. Superior Court, Nov. 15, 2001 (on file with authors). Judge Gants, who attended the meeting of Massachusetts Trial Court judges at Maison Robert Restaurant, Boston, Mass., Nov. 14, 2001, discussed Boyd's remarks.

126. *Id.* Two other recent incidents also lend credence to this law enforcement strategy. In Buffalo, New York, six Arab-Americans were arrested in September 2002 for operating an Al Qaeda cell. They were arrested based on a tip from within the Arab community. See generally Mark Miller & Mark Hosenball, *The Hunt for Sleeper Cells*, NEWSWEEK, Sept. 30, 2002, at 26. In Dearborn, Michigan, the FBI sent letters to Arab community leaders, offering to meet with them in person to discuss issues in the War on Terrorism. To engender trust, the letters specified that the FBI was not concerned with the individuals' immigration status. As a result, only a dozen out of the 500 individuals contacted by the FBI refused to talk. See generally *Civil Liberties and the War on Terrorism, Voices of Reflection* (NPR News broadcast, Aug. 28, 2002), available at <http://www.npr.org>.



Instead of settling for the false sense of security that profiling Muslims and Arabs may provide, we should insist that the FBI and CIA obtain better intelligence about potential terrorists, terrorist activity and terrorist organizations here and abroad. That intelligence must be used to create better “watch lists” for any borders and airports. We must invest in better security systems for our cities, airports, public places, and buildings. Only when we address these fundamental security issues will we truly be safe from terrorist attacks.

### CONCLUSION

While the use of race in law enforcement actions is not always considered illegal, it is generally inappropriate and ultimately ineffective. If law enforcement alienates the very communities that can help them to solve crimes and apprehend criminals, and, at the same time, fails to deter crime or find contraband and criminals, everyone loses. As Attorney General John Ashcroft put it:

[Racial profiling is] a lose-lose situation . . . . We'll only have good law enforcement in the country to the extent that the people participate. As soon as you start to peel off groups of people and say “We’re not going to participate with law enforcement, we don’t trust it,” we erode the fabric of justice that’s necessary to sustain a free culture.<sup>127</sup>

Under the definition we have proposed in this Article, using race as a general or circumstantial correlation with criminality is inappropriate. Race, ethnicity, or national origin can be used, however, if it meets an exception to the general definition, namely that it is one factor in a suspect-specific or crime-specific description. Particularly in these times, with the ongoing threat of terrorist activities from Al Qaeda, we must reject racial profiling as an ineffective strategy and insist that law enforcement develop more effective, reliable ways of interdicting terrorists and keeping all law-abiding Americans, regardless of their race or nation of origin, safe and protected.

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127. Ashcroft, *supra* note 37 (discussing the implications of racial profiling on relations between minority communities and law enforcement).

